No. 85-1551

IN THE

Supreme Court of the United States

October Term, 1986

KARCHER, et al.,

Appellants,

v.

MAY, et al.,

Appellees.

Supreme Court, U.S.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, OHIO, PENNSYLVANIA, TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLANTS

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INTEREST OF AMICI CURIAE[1]

This case presents important issues relative to the meaning of the establishment clause. While *amici* do not believe the moment of silence in itself to be of great value to religious freedom, the issue it raises regarding the role of accommodation in a theory of the religion clauses is critically important. The lower courts in this case exhibited a common tendency to regard accommodation as constitutionally suspect, particularly where the accommodation arises as a result of an explicit decision by government to take religion into account in its structuring of the social order. The Rutherford Institute believes that this tendency misconceives the important role of accommodation in establishment clause doctrine.

[1]Counsel of Record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

Amici Curiae are nonprofit religious corporations named for Samuel Rutherford, a seventeenth-century Scottish minister and rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts as set forth in Appellants' brief filed with this Court.

SUMMARY OF ARGUMENT

The Circuit Court below was preoccupied with the appropriate rendering of the secular purpose requirement. This approach mistakenly focuses on the formulaic dimension of the secular purpose test; as a matter of the jurisprudence of form, the tripartite test has more of the character of a standard than of a mechanical rule. The formulaic approach cannot, in any event, obviate the need to resolve the conflict between background conceptions, for one must resolve that conflict in order to choose among the contending formulations.

The changes in political philosophy implicit in the development of American society have had perhaps more of a distorting effect on establishment clause doctrine, because of its strong connection to an historical understanding, than on any other area of constitutional law. Twentieth-century establishment clause doctrine, in its formative stages, was guided by a paradigm that, although not perhaps directly derived from an historical understanding,

drew heavily on images appropriate to that earlier era. In particular, early establishment clause doctrine drew on an image of separation that pictured government and religion in discrete terms, as if there were discernible boundaries that marked off the separate spheres of religion and government; the critical characteristic of this conception was its commitment to the notion that government and religion occupied mutually exclusive, independent territories, that each could carry on its business without trenching upon the affairs of the other. The problem was that even as this Separation Paradigm was being articulated at the middle of this century, the extremely limited government model it presupposed was, with the death of laissez-faire capitalism, passing away.

Much of modern establishment clause doctrine has focused on monitoring and shaping, as opposed to renouncing, the interface between government and religion. As a consequence, the Separation Paradigm, which can explain such interfaces only as an exception to the rule, has slowly lost its explanatory power. In its place, one can detect the outlines of a new emerging paradigm focused on neutrality. Accommodation, far from serving as an exception to the rule, plays a central role in the emerging theory of neutrality.

The premise of the Neutrality Paradigm, which explains the growing role of accommodation in the context of our modern welfare state, is that the true logic of neutrality is contextual. While the new paradigm does not dictate results in particular cases, it can serve as a conceptual framework that orients courts to more general boundaries.

The primary value of the new paradigm is in locating the role of accommodation within a coherent theory of the religion clauses. On the most elemental level, it shows that there is nothing in principle wrong with government taking religion explicitly into account in its structuring of the social order. In applying this insight to the present case, it is obvious that the point over which the Court below stumbled—the legitimacy of the purpose to accommodate religious belief—is completely benign from a constitutional standpoint.

ARGUMENT

I.

Introduction

The debate over the moment of silence concept, as it has developed not only in this case but also in numerous others, has an almost surreal quality to it. It would be easy enough to understand the intensity of the debate and the attention given to the idea by various state legislatures if all that were involved were an ill-conceived attempt by the states to re-introduce prayer into the schools. Polls have shown that, despite this Court's pronouncements on the subject and the obvious unneutrality in state-sponsored prayer, many people, if not the majority of the public, still favor school prayer. So it would not be altogether surprising to find some manifestation of this public sentiment surfacing at the legislative level.

Yet it would take an unstinting cynicism to see in this case only a clumsily effected surreptition. For it seems clear that the New Jersey legislature genuinely sought to draft a law that actually (not just apparently) conformed to this Court's pronouncements regarding state endorsement of prayer. It may, of course, be true that some legislators privately hoped that the law would effect a reintroduction of state-sponsored prayer. But the law is scarcely designed to have that effect, as even the Circuit Court below concluded, *see May v. Cooperman,* 780 F.2d 240, 248-50 (3d Cir. 1985), and it would thus take an unduly pessimistic view of the aptitude of legislators to believe that that is what they were trying to do. That the law had as one of its aims the accommodation of a modicum of religious voluntarism can, on the other hand, scarcely be denied. But whatever the legal significance of such an intent, there is an enormous factual difference between an intent to accommodate religious voluntarism and an intent to advance religion itself.

It is, however, just this distinction which gives the moment of silence issue its surreal quality. For if the picture of the legislature striving awkwardly, ineffectually, and—one is

bound to say (at least if one takes this view seriously)—stupidly to smuggle an endorsement of prayer back into the schools via the seemingly sterile moment of silence law is indeed a caricature of reality, as we think it is, then it is difficult to see what the stir is all about.

From a religious perspective, it is hard to see that much of significance hangs on the right to a moment of silence. For one thing, students already have the right to pray silently, if only because it is not (given current technology) possible to stop them. For another, it is hard (even for those who believe, as we do, in the value of prayer) to believe that the incremental prayer achieved, if any, in the moment of silence will have the kind of critical value that would explain the attention given to it.[2] We feel sure that those who live a life of prayer would be neither sustained by such an opportunity, if it existed, nor turned aside from a path of devotion, if it were denied.

Nor is it likely that those for whom prayer is at most a passing concern will be induced thereby to become men and women of prayer. While it is difficult to project precisely what the religious impact of such a law might be, those whose concern is the spiritual character of Americans would, from all appearances, be better advised to focus their energies elsewhere. Indeed, we feel that if religion in America has come to the place that anything of significance, much less the continued vitality of religion, hinges on the right to a moment of silence, then it would be better for religion itself that the right, such as it is, be denied.

In our view, then, while the law at issue has little, if any, value to religion, the legislative purpose to accommodate religion to this extent is at the same time, and partly for this reason, almost completely benign. We can now make clear our purpose in this somewhat lengthy introduction: we wish first of all to distinguish what we see as the real significance

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[2]This is not in any way meant to demean the value of prayer. Rather, as is made out more fully below, we wish to make clear our disdain for the idea that true religion is such a puerile, desiccated thing that it should be grateful for a state-orchestrated moment of silence. By the same token, we find almost ludicrous the idea of such an insipid practice being driven from the schools as an establishment of religion.

of this case from these other more ephemeral concerns, and second, to prevent our genuine conviction that the case is significant in one respect from being mistaken as any kind of solicitude for the moment of silence itself. We write not to plead for a moment of silence, much less to plead for it in the name of religion, but with an eye toward the larger issues of constitutional philosophy reflected, if only dimly, in the outlines of the struggle here.

II.

The Secular Purpose Dispute Cannot Be Resolved By A Formulaic Approach But Must Be Evaluated In Light Of The Larger, Background Conflict That Animates It.

A. Even If One Conceives Of Secular Purpose In Formulaic Terms, One Must Recur To A Background Conception Of The Establishment Clause To Choose From Among The Contending Formulations.

The larger, background conflict can be stated in terms of the argument over secular purpose that occupied both courts below. *See, e.g., May v. Cooperman,* 780 F.2d 240, 250-53 (3d Cir. 1985). But precisely because its resolution turns on a conflict of larger dimensions, merely stating the conflict in terms of the secular purpose requirement does not illuminate it. Of course, just as the conflict itself could be expressed in terms of the secular purpose issue, so could any particular outcome of that conflict. What is important is not the semantical rendering of that outcome, whether in terms of secular purpose or some other test, but that the outcome, however expressed, properly takes into account the major principles at stake.

In theory, if one could identify a particular, discrete and clear version of the secular purpose requirement, the only remaining task would then be to apply the legal construct so conceived to the facts of the case at hand. The facts thus marshalled would, in turn, yield a correspondingly discrete and definite solution (conveniently framed in the very terms

of the inquiry): secular purpose *vel non*.[3] Without a clear version, one could know everything in the world about the intent of the legislators and still not have a clue as to the existence of secular purpose. The Circuit Court below proceeded as if such a clear version existed, and had indeed been applied correctly by the District Court to discover a forbidden religious purpose, which was, more specifically, the "purpose of accommodating the religious beliefs of some students." Treating the notion of "purpose," so defined, as unambiguous,[4] the Court hesitated momentarily

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[3]Putting the question in this way—in dichotomous terms, as if there were always a yes or no answer—makes it plain that the question is not merely factual, but heavily legal. Facts rarely come in such a clear-cut form, but legal tests of this type require us to view every set of facts as if they had such a form. To put it differently, such tests require us to impose this form onto a more complex reality. *See* Leff, *Law And,* 87 Yale L.J. 989 (1978). For this reason, Judge Becker is clearly correct in asserting that the finding of religious purpose by the District Court is not simply a factual finding to which this Court must largely defer, but a complex legal conclusion subject to this Court's review.

[4]There are, however, real problems with treating it as unambiguous. For example does a purpose to accommodate religious beliefs still constitute a religious purpose if it is only a subordinate aim? Would it make a difference if the purpose was a strong secondary purpose, or would even a tertiary subordinate purpose sufficiently taint the psychological profile of the legislators to disable the constitutionality of their overall aims? More subtly, what if the legislators viewed accommodation as a *negative* aim or condition of the law, such that the legislators would be happy with the law if it succeeded in inculcating an orderly secular atmosphere at the commencement of the school day, but only if this could be achieved in such a way as to avoid *requiring* secular contemplation?

As discussed further below, these versions do not even touch on the more difficult issues hidden within the concept of secular purpose, but all of these versions are linguistically plausible accounts of what a legislator who said, "My hope is that this law will accommodate the religious beliefs of some students," might have meant. The point, however, is not to suggest that the secular purpose requirement entails irresolvable factual complexity. Rather, the point is that the notion does not have a self-evident *legal* meaning.

over the question whether a definition of religious purpose that included a purpose to accommodate religious beliefs as religious was constitutionally sound, before concluding, though not apparently without some misgivings,[5] that it was.

Now the interesting thing, for our purposes, is that the Court below seemed confident that the answer to its question—whether a purpose to accommodate the religious beliefs of some students was constitutional—could be found in one or another formulation of the secular purpose test. And this is interesting precisely because, as we began by saying, the answer could in theory have been expressed in such terms. And since this question of accommodation is obviously so central to an understanding of the religion clauses, one has to wonder why its answer has not, as the Court below discussed, been formulated in these terms.

B. The Formulaic Approach Followed By The Circuit Court Below Is Inappropriate Because, To Use A Distinction Often Made In The Context Of The Jurisprudence Of Form, The Three Prongs Of The Tripartite Test Were Conceived More As Standards Than As Rules.

The reason for this, it would seem, is that the *Lemon v. Kurtzman,* 403 U.S. 602 (1971), tripartite test was never intended to function as a mechanical rule, and has not developed in a manner that would make it amenable to that end. To use the distinction often made in the context of the jurisprudence of form, the tripartite test seems to have been intended to serve more as a standard than as a rule; it was not designed to have "formal realizability" across the general sweep of cases, but as a sort of guidepost to orient courts in the development of particular rules on a case-by-case basis. *See, e.g.,* Kennedy, *Form and Substance in Private Law*

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[5]The Court specifically observed that it did "not find any clear answer in *Wallace v. Jaffree,*" which was, somewhat paradoxically, the Court's principal, if not its only, source for determining the answer to this question. *See May v. Cooperman, supra* at 252.

Adjudication, 89 Harv. L. Rev. 1685 (1976) (discussing jurisprudence of form issue). Even the distinction between standards and rules does not fully capture the formal qualities of the tripartite test, because the test does not function as a standard in the conventional sense of a clearly articulated general goal, such as "capacity to contract." Rather, the tripartite test is best understood as an attempt to formalize the different dimensions of the basic establishment clause goal of achieving government neutrality with respect to religion. Hence, one cannot determine from one or another extant formulation of the secular purpose requirement whether a purpose to accommodate religious beliefs is secular in the required sense.

This is not to say that establishment clause doctrine does not speak to the question of accommodation. On the contrary, there is much in the way of establishment clause doctrine that can be brought to bear on that subject. But this is precisely the point, that in order to give a meaningful answer to the question whether a purpose to accommodate religious beliefs is a "secular" purpose, one must recur to background conceptions of the establishment clause itself. The Circuit Court, in its myopic fascination with the formulaic dimension of the secular purpose test, never even considered the broader concepts of establishment clause doctrine relevant to the issue. Yet, if there is nothing in this Court's specific formulation of the secular purpose requirement, neither is there anything intrinsic to the notion of "secular" as a general matter that would tell us whether an attempt to accommodate religious beliefs, as distinguished from encouraging them, was secular or religious in nature; all depends upon the role that that distinction plays in effectuating the broader goals of the establishment clause. So it is to a discussion of these broader goals that we now turn.

III.

One Of The Central Themes In The Development Of Modern Establishment Clause Doctrine Has Been The Waning Of An Older Paradigm Focused On Separation And The Emergence Of A Newer Paradigm Focused On Neutrality.

A. Even As The Separation Paradigm That Served To Organize Early Establishment Clause Doctrine Was Being Conceived, The Very Image Of A Non-Interventionist Government To Which It Appealed Was, With The Death Of Laissez-Faire Capitalism, Passing Away.

At the core of the modern interpretation of the establishment clause has always been a concern for governmental neutrality toward religion. In the seminal cases decided at the middle of this century, this concern for neutrality was expressed as a proscription against government action that either advanced or inhibited religion. *E.g., Everson v. Board of Education,* 330 U.S. 1 (1947). At that time, it was still possible to conceive of government and religion in discrete terms, as if there were discernible boundaries that marked off the separate spheres of religion and government within which, in the normal course of things, each was expected to remain. The critical characteristics of this conception was its commitment to the notion that government and religion occupy mutually exclusive, independent territories, that each could carry on its business without trenching upon the affairs of the other. The wall of separation metaphor, evoking, as it did, the image of separate territories, was a natural handmaiden to this background conception. It was, from the standpoint of logical clarity and symmetry, an admirable and appealing conception.

The problem was that even as this Separation Paradigm was being born,[6] the era to which it might possibly have

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[6]The conception of a true neutrality toward religion was clearly a twentieth-century conception. To the extent the framers even conceived of the establishment clause as requiring neutrality, most of them would have thought of it in very different, which is to say much less secular, terms. For them, neutrality would most likely have meant neutrality

applied was rapidly dying out. For this conception was articulated, with an eye toward the era that began with the framers, even as the country, and with it, the rest of constitutional law, was making a transition from the limited government model associated with laissez-faire capitalism to the model of government intervention associated with welfare capitalism. *cf.* Ackerman, *Beyond Carolene Products,* 98 Harv. L. Rev. 713 (1985) (discussing the transition). In the context of the extremely limited government with which the framers were familiar, the idea of separate spheres for religion and government may well have been a workable conception.[7] So too it might have been adapted to the era of laissez-faire capitalism that ended, at least insofar as constitutional philosophy is concerned, in 1937.

But it simply cannot accommodate the very different problems associated with modern government in a welfare state. As a consequence, the Court ran into trouble with the wall of separation metaphor almost from the start. Thus, for example, in *Everson,* 330 U.S. 1, 11-12 (1947), the Court approved the provision of government transportation to children attending parochial schools even while brandishing the admonition that it would not tolerate the slightest breach in the wall of separation. Similarly, in *Board of Education v. Allen,* 392 U.S. 236 (1968), the Court approved the loan of secular textbooks to students in private religious schools.

(footnote 6 continued)

among the different Jewish and Christian sects, or, in other words, acceptance of some form of theism. *See generally,* R. Cord, *Separation of Church and State: Historical Fact and Modern Fiction* (1982). The notion that the establishment clause requires neutrality between religion and irreligion, while appropriate given the vastly different cultures of the twentieth and eighteenth centuries, is a distinctly modern notion.

[7]That is to say, it is a conception that might have been consistent with, though it is certainly different from, the concept of establishment held by the framers. In his later life, Madison worked out a quite similar conception, but his views probably represent a minority viewpoint. *See,* E. Fleet, Editor, *Madison's "Detached Memoranda,"* 3 William and Mary Quarterly 535 (1946).

B. The Separation Paradigm, Like The Era To Which The Image It Evokes Corresponds, Is Now Anachronistic And No Longer Helps To Explain Or To Guide Modern Establishment Clause Doctrine Which Focuses On Overseeing, As Opposed To Renouncing, The Interface Between Religion And Government.

Those decisions, marking out what would constitute exceptions if viewed within the framework of the Separation Paradigm, have not proved to be aberrations. In fact, far from pressing the separation theme, much of modern establishment clause doctrine is devoted to overseeing (as opposed to preventing) the interface between religion and government. The public benefit principle, under which religious persons and institutions are permitted to share equally with others in the benefits of general government programs, is one prominent example. *See Mueller v. Allen,* 463 U.S. 388 (1963); *Witters v. Washington Commission for the Blind,* 474 U.S. ____, 106 S. Ct. 748 (1986); *Walz v. Tax Commission,* 397 U.S. 664 (1970). Another example is the secular use concept, under which religious institutions may participate in government aid directed specially to them, so long as the aid is restricted to secular purposes. *See Board of Education v. Allen,* 392 U.S. 236 (1968); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Wolman v. Walter,* 433 U.S. 229 (1977). Yet another is the implicit limitation on the scope of the definition of religion for establishment clause purposes, which is necessary to modulate the more intense connections between government and religion that characterize today's welfare state. *See, e.g.,* Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1056, 1085-86 (1978).

Partly, if not largely, for this reason, the Separation Paradigm which, in one form or another, had served as the guiding paradigm of modern establishment clause doctrine, seemed to be almost completely in tatters by the early 1970s. *See, e.g., Lemon v. Kurtzman,* 403 U.S. 602, 612-14 (1971). By that time, it was no longer possible to explain the overall fabric of the law in terms of the old paradigm; but neither was a new paradigm ready to take its place. It was at

this point that this Court announced the new three-part test. *Id.* At the outset, this Court specifically disavowed any attempt to set forth general principles. *Id.* If by general principles, one means to refer to a regime of formally realizable rules of general application, then it is certainly true that general principles will not do; it is simply not practicable to try to anticipate under a few general headings the incredibly varied and numerous church-state problems of today's society.

C. A New "True Neutrality" Paradigm, In Which Accommodation Of Religion By An Interventionist Government Comprises The Central Theme, Has Been Emerging From Within The Shell Of The Older Separation Paradigm.

It is, however, possible to point to the emergence of a new background conception or paradigm, which we shall call the True Neutrality Paradigm, which can serve on a very general level as a frame of reference to orient courts in particular cases. While such a conception would not dictate obvious results in particular cases, it would have the most salutary effect of making argument about many issues much more intelligible. It would serve the function of what Professor Bruce Ackerman has in another context denoted by the phrase "Comprehensive View." *See* B. Ackerman, *Private Property and the Constitution* (1976). This conception is already implicit in this Court's doctrine and has been adumbrated by several commentators, though its application to the public school context has yet to be made explicit.

1. The Premise Of The True Neutrality Paradigm Is That The Concept Of Neutrality, To Remain Constant In Real Terms, Must Receive Interpretations That Vary With Changes In The Role Of Government.

As several commentators have observed, the concept of neutrality, to remain constant in real terms, must receive interpretations that vary with changes in the role of govern-

ment.[8] *E.g.*, Tribe, *American Constitutional Law*, 834 (1978) (movement from government of closely limited powers to affirmative state requires reevaluation of religion clauses; in affirmative state, religious tolerance may become "positive commitment that encourages the flourishing of conscience" rather than simply "negative principle"); Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development* (Pt. 2), 81 Harv. L. Rev. 513, 514-15 (1968).

a. The Example Of The Collectivist State Shows That The Degree Of Accommodation Appropriate Varies Directly (If Not Proportionately) With The Extent Of Government Involvement In The Social Order.

Professor Gianella, in his landmark article on the establishment clause, used the example of the hypothetical collectivist state to illustrate this idea. In the context of a limited government, a distribution of property from government to religion would, in general, tend to advance religion. But a state that controlled all resources (Gianella's hypothetical collectivist state) would have to make government property available for the use of religious groups in order to avoid inhibiting religion. As Gianella indicates, the very concept of neutrality that proscribes a distribution of property in the former case would demand it in the latter case.

b. The Idea Of Accommodation Is Derived From The Notion Of An Advance (In Religion), Which In Turn Presupposes A Concept Of An Original Position.

It is easily seen how this conception relates to the notion of accommodation. The basic problem presented by accommodation is whether the particular accommodation at issue advances religion in some degree. And the principal difficulty in assessing any such claim is that it is impossible to evaluate whether or not a particular accommodation advances religion without a frame of reference that defines as

[8]The only other alternative is to hold the role of government constant.

normative some state of affairs. For the very notion of an *advance* presupposes an original position[9] (with reference to which the current state is an advance). The confusion in present doctrine with regard to the role of accommodation derives from the fact that the concept of an original position, though indispensible as a logical matter, has remained only implicit. Thus, its role as a normative standard has remained shadowy; as a consequence, the critical questions regarding what the normative standard is or should be tend to get resolved on a merely intuitive level.

2. The Effect Of Both The Older Separation Paradigm And The Newer Neutrality Paradigm Can Be Seen In The Conflicting Intuitions Generated By The Accommodation Issue.

In particular, there are two sets of typical intuitions, at cross-purposes with one another, concerning the original position that affect and confuse judgments about the legitimacy of accommodation. On the one hand, there is a strong intuitive tendency to view any accommodation of religion as a benefit to religion (*i.e.*, as an advance). This intuition derives directly from the background conception that assigns separate and discrete spheres to religion and government. From the standpoint of this Separation Paradigm, any benefit flowing from government to religion constitutes a presumptively illegitimate benefit. This conception plays upon our tendency to think of the present state of affairs as normative, so that any new benefit conferred automatically constitutes an advance. If, today, bus transportation is not provided to parochial school students, but tomorrow it is, one who is oriented to today as normative will tend to see tomorrow's benefit as an advance. The problem here is the arbitrary identification of the present as

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[9]The phrase "original position," as used here, is not meant to invoke the notion of an original position as used in the work of Rawls. J. Rawls, *A Theory of Justice* (1971).

normative.[10] In a subtle way, the background conception associated with the Separation Paradigm leads us to think of the present as a state of mutual non-intervention, that is, as it is portrayed for us in that paradigm, and thus reinforces the natural tendency to view the present as normative.

Yet, on another level, there is an almost equally strong intuitive tendency to view accommodations as reasonable and equitable. This intuition derives from the background conception that we are advancing here. Thus, it seems reasonable to us that Gianella's collectivist state should permit religious groups the use of property. There are two intuitive paths to this result. First, there is a tendency to think of (some degree of) private ownership of property as normative. Hence, we tend to see the provision of property by the collectivist state as merely restoring the normative condition and not as advancing religion. Second,[11] if we distance ourselves from the view of private property as normative, we tend still to imagine that the state has an obligation to allocate social resources in a manner sensitive to private impulses. Hence, we would view a state that denied access to property to religious groups as unfairly inhibiting religion

[10]This conception is all the more intuitively attractive in the legal context because of the traditional concept of lawsuits as being for the purpose of deciding the immediate interests of actual parties. This imposes an implicit limitation on the context to which a court is able to refer in determining what is or is not an advance. *cf.* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 Harv. L. Rev. 1 (1979) (discussing role of courts in developing structural solutions).

[11]Both of these versions appeal to the same meta-principle of voluntarism. The first case supposes an original position of parity between government and religion in which true voluntarism rules: Government does not interfere with religion and religion does not overreach itself by extracting special dispensations from government. Accommodation is thus justified in this view as a move back to true voluntarism, or, if you will, to the original position. The second case appeals directly to a notion of voluntarism. In that view, government action frustrating voluntarism must be rescinded or countermanded by action that *enables* true voluntarism. Just as the first case implicitly rests on a notion of voluntarism, so the second case implicitly rests on a notion of an original position, for without such a frame of reference, we should not know that anything was amiss.

because such action frustrated the unadulterated, or purely voluntary, private impulse.

In effect, Gianella's example of the collectivist state uses our very tendency to see the present as normative to show us that it is not. For by positing the hypothetical case, he creates a second "present" for us to contend with (the "present," which is to say the time immediately preceding a move toward accommodation, of the hypothetical). But the abstract "present" of the hypothetical easily loses out in our intuitive grasp of a normative world to the real present of our experience. Hence, it seems natural to correct the "present" of the hypothetical to comport with intuitions generated out of our current reality. But doing this gives the game away; for then it is clear that the present, or the time immediately preceding a move to accommodation, is not *in principle* the original position or natural point of normative reference.

3. The Neutrality Paradigm, Which Holds Accommodation To Be A Function Of Context, Shows Why The Net Intuitive Balance Favoring *De Minimis* Accommodation Is Flawed.

a. The *De Minimis* Version Of Accommodation Draws Inconsistently On Both Paradigms.

The net result of the clash of these two strong intuitions is a general view that certain kinds of accommodations are acceptable, so long as they do not benefit religion too much. In effect, the overlay of the True Neutrality Paradigm onto the Separation Paradigm produces, though illogically, a strong net intuitive tendency to create a *de minimis* exception to the general principle that religion should not benefit at the hands of government. In that view, the question of the legitimacy of accommodation becomes a matter of degree. In effect, the intuitive balance produces something like an absolute rule favoring minimal accommodation. As discussed further below this may, though for entirely different reasons, approximate the conclusion generally appropriate to a welfare state.

b. The True Logic Of Neutrality Is Contextual And Does Not Fix A Particular Level Of Accommodation As Ideal.

But the true logic of neutrality does not fix any given level of accommodation as inherently optimal. The contrast of the model of extremely limited government that the Separation Paradigm draws upon with Gianella's collectivist state shows that the degree and nature of accommodation vary directly (though not necessarily proportionately) with the extent of government control over the social order.

It is worth emphasizing the connection between the Separation Paradigm and the limited government model, because it brings out why accommodation is a contextual question and underscores the fallacy of trying to use the Separation Paradigm as a model to guide establishment clause adjudication in our modern welfare state. By hypothesis, the Separation Paradigm encompasses as ideal the extreme case in which there is no overlap between the respective jurisdictions of church and state. Each remains discretely within its own sphere.

This entails, by definition, a model of extremely limited government. In actuality, as far as church and state are concerned, it is a model of no government, or of basic anarchy, because there is no unitary government order governing the respective territories of each. What minimal relationships exist between the two are, in this model, somewhat analogous to the relationship of nations under international law. In this context, government support of religion would clearly violate neutrality by advancing religion.

Professor Gianella's collectivist state comprises the model of the other extreme of complete socialism. In this model, the government has full control over the social order, including ownership of all property. In this context, the failure of government to accommodate religion by making government property available for religious use would clearly violate neutrality by inhibiting religion. Accommodation, in this context, clearly constitutes a move in the direction of neutrality.[12]

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[12]Whether it is a sufficient move is a question outside the scope of the present discussion. It is doubtful that establishment clause doctrine could be adapted this far without doing violence to the particular

These two extremes are suggestive of the application of neutrality to contemporary government:

> Contemporary government does not, of course, exercise the dominance of the collectivist state, and the sort of restorative measures that would contribute to neutrality in the collectivist state would serve demonstrably to advance religion if effected by contemporary government. Nevertheless, contemporary government does exert influence over resources and activities whose control is of central concern to religious groups, making applicable the principle, though not the specific prescription, deducible from the collectivist state.[13]

This same conclusion is implicit not only in much of modern First Amendment doctrine, but also in the structure of church-state affairs. The accommodation of religious programming by earlier FCC regulations designed to ensure the survival of religious programming under a regime of partial government control, the accommodation of religious expression under the limited public forum doctrine of *Widmar v. Vincent,* 454 U.S. 263 (1981), the public benefit principle, and the secular-use concept all are doctrinal adjustments to the age of the welfare state that operate to shape the character of governmental intervention in the social order in such a way as to ameliorate its negative impact on religious interests. It would therefore seem beyond argument that there is, in principle, nothing inherently unconstitutional about a purpose to accommodate religious beliefs.

(footnote 12 continued)

character of the neutrality that the clause envisions. However that may be, the salient point here—that accommodation would in that context increase, rather than detract from, neutrality—is unaffected.

[13]Note (Dencer), *The Establishment Clause, Secondary Religious Effects, and Humanistic Education,* 91 Yale L.J. 1196, 1199 n. 21 (1982).

c. The Dangers Of The *De Minimis* Version Of Accommodation Theory.

As we suggested at the outset, the appeal of the separation conception is based on an orientation to a society that no longer exists (if it ever did). While this Court has formally abandoned such a conception,[14] the failure of a new paradigm, such as the one mentioned here, to take its place leaves room for the old conception to exert a strong influence on an intuitive level, if only because, as the saying goes, "nature abhors a vacuum." The notion of *de minimis* accommodation to which it (in conjunction with the influence of the emerging Neutrality Paradigm) leads is dangerous for two reasons. First, it leaves open the possibility that unjustified benefits to religion will be treated as acceptable by courts on *de minimis* grounds. Second, it casts an illegitimate pall over actions designed to enable true voluntarism. Despite its intuitive appeal, the old Separation Paradigm,[15] as applied to most instances of accommodation today, involves a patent solipsism: it appeals to an image of separation to prevent an accommodation that is necessary precisely because the imagined separation does not exist.

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[14]We should emphasize that the Separation Paradigm we refer to here is the image that corresponds to the rule of strict separation. While very few scholars, for example, would today hold to a rule of strict separation, many are probably still unconsciously influenced by what we are here calling the Separation Paradigm, if only because it is a simple and natural image.

[15]What we say here should not be taken as denying the validity of separation as a general principle. Without question, some core degree of separation is necessary to religious liberty. Indeed, for that reason, the establishment clause would presumably stand as a bar to the formation of Gianella's hypothetical collectivist state. Thus, the state presumably could not take away all the property of religious institutions, even if it agreed to arrange provisions accommodating religious voluntarism. What we are rejecting, rather, is the illusory image, or, as we have termed it, background conception, which illogically undermines the basis of legitimate accommodations by conjuring up a nonexistent normative world as a standard of comparison.

IV.

The True Neutrality Paradigm Carries Forward The Very Precepts Of The Separation Paradigm That Made It An Appealing Conception And Adapts Those Precepts To The Realities Of Church-State Affairs In The Welfare State.

A. General Implications Of The Neutrality Paradigm.

The alternative True Neutrality Paradigm is in fact merely an adaptation of the earlier Separation Paradigm designed to fit the key precepts of that earlier paradigm to the changed circumstances of a modern governmental order. The Separation Paradigm fits the limited government model. But its ideal of mutual nonintervention cannot be achieved in an age when government has expressly undertaken all kinds of responsibilities that affect the interests of religious groups and persons. If nonintervention were itself a value that inhered in the establishment clause, one might argue against the constitutionality of the welfare state on establishment clause grounds. But nonintervention is merely instrumental to the ultimate value of neutrality. Yet, just as neutrality is preserved in the original position of nonintervention imagined by the Separation Paradigm, so the intervention by government into affairs touching on religious interests upsets the equipoise entailed by nonintervention and endangers neutrality.

The obvious response to this problem is for government to take religious interests into account, with a view toward protecting religious voluntarism, in its management of the social order. Such forms of *accommodation* carry forward the precepts of the Separation Paradigm and adapt them to the complex realities of modern church-state affairs. In this sense, the True Neutrality Paradigm we have argued for here is simply the next stage in the conceptual evolution of First Amendment doctrine. It is, in a word, the Separation Paradigm come of age.

We have thus far discussed only the general contours of the role of accommodation in a theory of neutrality. There

are, obviously, a host of subordinate questions that would have to be answered in the development of a mature theory. But our purpose here is merely to identify the general outlines of such a theory for the light they shed on the issue of accommodation in general.

Nothing we have said implies that accommodation is always required, or dictates what degree of accommodation is required, or indicates what manner of accommodation is appropriate. Each of these issues requires a more refined notion of neutrality than is necessary for the present discussion. Similarly, the theory of neutrality does not, as a general matter, imply that accommodation will always be sufficient to ameliorate the unneutral effects of governmental intervention. There are surely cases, such as envisioned by Professor Gianella's collectivist state, in which accommodation is an inadequate measure to compensate for the impact of government action on religious interests.

Because the question of accommodation entails difficult questions and judgments regarding how to modulate government action, one would, in today's environment, be hesitant to say that accommodation is constitutionally required. The balance is, at least, normally close enough to neutrality that one would hesitate to conclude that the *general* unneutrality occasioned by various government actions requires a *specific* accommodation. Precisely because it entails this type of difficult factual judgment, it is natural to leave to the legislature, in the first instance, the task of designing accommodations. Yet, just as a court should be hesitant to require such accommodations as a matter of constitutional law, so the courts should be hesitant to strike down an accommodation, for there is nothing *in principle* constitutionally wrong with such measures. Thus, unless the accommodation clearly overreaches its purpose, it should bear a presumption of legitimacy.

B. Specific Implications Of The Neutrality Paradigm For The Public School Context.

In applying these principles to the instant case, it is clear that the moment of silence statute should receive consti-

tutional approval. For there is nothing unconstitutional about the intent to take religion into account, so long as the judgment as to how to do so is within the bounds of a reasonable accommodation. If, as the Circuit Court concluded, it is, then the statute itself must be constitutional. This assumes, of course, that the Circuit Court was correct on the substantive issue. To explain why we think that it was, it is necessary to consider briefly the issue of accommodation in the public school context.

The True Neutrality Paradigm discussed above does not lead by any process of strict logic to conclusions concerning the particular types of accommodation that should be acceptable in the public school context. Yet it does provide a frame of reference from which certain general boundaries can be deduced.

1. The Fallacy In The Traditional Analysis Turns On A False Equation Between Secular Public Schools And The Original Position.

The specific implications of the True Neutrality Paradigm are perhaps best developed by using the traditional analysis, which draws in part upon the older Separation Paradigm, as a point of departure. The traditional analysis includes the conclusions of the Separation Paradigm as a minor premise within a syllogistic argument which has as its major premise the notion that government should not advance religion. The minor premise, that things were in a truly neutral posture immediately prior to and apart from the addition of the particular accommodation or religious practice at issue in the case, then enters to set up the conclusion that the addition of the offending religious practice has disturbed the equilibrium and thereby advanced religion. To put it more crudely, the logic of this argument has it that (1) there was no religion in the schools before, (2) there is some religious practice now; (3) therefore, religion has been advanced by the addition of the practice or accommodation.

It is, of course, obvious from what has been said that the validity of the minor premise hinges completely on an equation between the current public school situation and the

original position. This equation is implicit in the assertion of the idea that "secular education can be isolated from all religious teaching." *Abington School District v. Schempp,* 374 U.S. 203, 218 (1963), quoting *Everson v. Board of Education,* 330 U.S. 1, 23-24 (1947) (Jackson, J., dissenting). For whether or not this statement is true,[16] it is irrelevant unless the ability to keep the public school secular can be equated with an original position of neutrality.

But this is obviously not the case. For the original position has reference to the point of complete voluntarism, to the state of parity in which government stays out of the affairs of religion and religion does not overreach its territory by extracting special dispensations from government. And the assumption by government of virtually plenary control over education completely vitiates that state of parity. This is not at all to say that such a move is unjustifiable but just to say that it must receive a justification in terms of the neutrality criterion.

Nor can it be argued that the assumption of governmental control over education does not touch upon traditional religious interests. For, on the contrary, education is traditionally the province of religious groups and private families. The transfer of this function from private hands to governmental control could not then occur without presumptively upsetting the original position of governmental neutrality toward religion in regard to education. How far it has been upset and what significance this has, are, of

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[16]This statement was perhaps more plausible at the time it was written, when there was (or appeared to be) more of a secular consensus about basic lifestyles and morality, than it is now, when radically different mores and worldviews closely associated with religion have made the public schools a focus for sectarian-based disputes over public school instruction. Because the public schools have such an important role in shaping the consciousness of young people, some have argued that they are inherently problematic from a constitutional standpoint. *See e.g.,* Arons and Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling,* 15 Harv. C.R.-C.L. L. Rev. 309, 316-17 (1980). It is clear that the public schools pose a potential threat to neutrality. Accommodations of various sorts, therefore, must be relied upon to defuse that unneutrality sufficiently to allay constitutional concerns.

course, separate questions. But it is at the very least not obvious that the difference is a trifling matter, if only because education is historically and functionally close to, if not a part of, the very lifeblood of the religious mission.

2. Accommodation Can And Must Play A Positive Role In The Theory Of Neutrality.

The question, then, is whether the character of governmental control of education can be managed in such a way as to bring within tolerable limits whatever unneutrality such control may entail. A comprehensive discussion of the methods by which this might be, or perhaps has been, accomplished is beyond the scope of the present argument. The existence of an option of private religious schooling, the possibilities for limited religious voluntarism under the 1984 Equal Access Law, the accommodation of released-time instruction approved by this Court in *Zorach v. Clauson,* 343 U.S. 306 (1952), and similar measures may help to obviate the problem. The difficulty, of course, is that the very efforts aimed at ameliorating hostility to, or suppression of, religious voluntarism simultaneously carry the potential to threaten neutrality from the standpoint of nonreligious or irreligious students. There may be no tidy answers to these problems.

It is, in any event, clear that efforts aimed at enhancing true neutrality through some sort of accommodation measure are not for that reason alone unconstitutional. In our opinion, the idea that accommodation can in principle play a positive role in the theory of neutrality is the most critical doctrinal point in controversy in the present case. Since we also concur with the Circuit Court as far as the essential substantive neutrality of a moment of silence, we conclude that the statute itself is constitutional.

V.

Conclusion

Accommodation of religious beliefs and practices has a central role in adapting the religion clauses to the breadth of governmental involvement in our modern welfare state. The

purpose to achieve the end of accommodation, as distinct from encouragement, of religious beliefs is beyond reproach as a constitutional matter. This Court should, therefore, reverse the decision of the Circuit Court below with respect to its views on secular purpose and uphold the constitutionality of the New Jersey statute.

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